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NO. 88-1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ATLAS PAPER BOX COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), prohibits a district court from crediting expert testimony to the effect that it is not necessary to conduct a specific validation study of an employment test where that test has been repeatedly studied in other employment settings and found to be valid, within the meaning of the Uniform Guidelines on Employee Selection Procedures?

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Reference to the District Court's Opinion:

EEOC v. Atlas Paper Box Company, 680 F. Supp. 1184, 44 FEP Cases 1782 (E.D. Tenn. 1987).

Reference to the Court of Appeals' Opinion:

EEOC v. Atlas Paper Box Company, 868 F.2d 1487, 36 DLR (BNA) D-1.

The Supreme Court's jurisdiction over this matter is derived from Section 1254(1) of Title 28, which allows the Supreme Court to review decisions of the federal courts of appeals upon a writ of certiorari. The decision sought to be reviewed was made by the Sixth Circuit Court of Appeals and filed on February 17, 1989. An order denying the Appellee's petition for rehearing was entered on April 4, 1989. The pertinent part of Title 28 §1254 is set forth verbatim as follows:

§1254. Court of Appeals; Certiorari, Certified Questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

The statute which this case involves is found under Title VII of the 1964 Civil Rights Act. The cite for the applicable sections is: Civil Rights Act Title VII, §703, 42 U.S.C. §2000e-2(a)(1), (h) (1964). The pertinent text of these sections is as follows:

42 U.S.C. §2000e-2(a)(1)

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, . . .

42 U.S.C. §2000e-2(h)

(h) Notwithstanding any other provision

> of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its admission or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Petitioner seeks to review the decision of the United States Court of Appeals for the Sixth Circuit which rejected, as a matter of law, a district court finding that it is not necessary to conduct a validation study of an employment test where that test had been repeatedly studied and found valid for similar jobs in other locations. The Sixth Circuit held that this Court's decision in Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), required a separate validation study in each instance before an employer could use an employment test which had an adverse impact upon black applicants for employment.

The Equal Employment Opportunity Commission brought suit against Petitioner in the United States District Court for the Eastern District of Tennessee, Southern Division, pursuant to Civil Rights Act Title VII, §706, 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1331(a). Among other things, the EEOC alleged that Petitoner's use of the Wonderlic Personnel Test as a screening device for applicants for clerical positions violated §702 of Title VII of the Civil Rights Act of 1964, as amended. Starting in 1969, Petitioner had experimented with the Wonderlic Personnel Test and eventually concluded that a passing score for its purposes would be 25 on the 50 question test. Eventually, Petitioner required an applicant to achieve a score of 25, and - in most cases - it would not hire a person who failed to make such a score.

Although this employment practice is not currently having an adverse impact upon black applicants, the court of appeals found that measuring the results of the test from 1969 produced a conclusion that the use of the Wonderlic Personnel Test did in fact have such an adverse impact.

In the district court, Petitioner offered substantial expert testimony for the proposition that not only was it not necessary to conduct a validity study of the Wonderlic Personnel Test at the Petitioner's place of business, but also that doing so would have been practically impossible. Furthermore, the expert testimony introduced by Petitioner was to the effect that the Wonderlic Personnel Test had been the subject of numerous validity studies at different locations, that these validity studies required the conclusion that the Wonderlic Personnel Test was a valid

predictor of employee performance in clerical settings, that the Wonderlic Personnel Test was in fact a far better predictor of job performance than virtually any other method of predicting employee performance and, most importantly, that the scientifically accepted generalization method for validating personnel tests made it unnecessary to conduct a separate validation study at Petitioner's place of business. Nevertheless, the court of appeals rejected all of this expert testimony out of hand, holding that this Court's decision in Albemarle Paper Company, supra, rendered the validity generalization method of validating employment tests illegal as a matter of law where such tests produce an adverse impact upon minority applicants.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the court of appeals gravely misinterpreted this Court's holding in Albemarle Paper Company v. Moody, supra. At the time that case was decided, 1975, it was generally accepted within the scientific community that it was necessary to conduct a validation study in each location in which an employment test would be used where adverse impact might result from the use of the test. However, since 1975 there has been enormous and significant scientific research into the methods of validating employment tests. Now, over a decade later, it is scientifically accepted that tests may be validated by studying the results of other validation studies performed in different locations where the jobs are, if not identical, generally similar.

The Wonderlic Personnel Test is a professionally developed test which measures cognitive ability. The expert proof in this case was that the use of the Wonderlic Personnel Test resulted in enormous efficiency savings for the Petitioner, possibly as much as One Million Dollars over the years. Nonetheless, the court of appeals held that this Court's holding in Albemarle Paper Company, supra, prohibits its use until a separate validation study at Petitioner's place of business is conducted. It rendered this holding even though, according to the expert testimony, such a validation study would have been impossible.

This holding is inconsistent with the decision of a district court in the Eleventh Circuit. In Pegues v. Mississippi State Employment Service, 488 F. Supp. 239 (N.D. Miss. 1980), the district court credited the expert testimony of Dr. John Hunter, who was

one of Petitioner's expert witnesses, that the validity generalization method has now been accepted;

> Empirical research has demonstrated that validity is not perceptively changed by differences in location, differences in specific job duties or applicable populations. Valid tests do not become invalid when these circumstances change. Plaintiff's allegation that validity is specific to a particular location, a particular set of tasks into a specific applicant population, or in other words, that a valid test in one set of circumstances is not valid in circumstances not perfectly identical is not true.

During this decade, there has been an enormous amount written in the scientific community on the topic of validity generalization, the concept declared illegal per se by the court of appeals. The leading exponents of this concept are Dr. Frank L. Schmidt who was formerly the Chief Psychologist in the United States Office of Personnel Management and Dr. John E. Hunter, who is a Fellow of the American

Psychological Association and is Professor of Psychology at Michigan State University. For example, one article published in the American Psychologist contains the following observation:

> Professionally developed cognitive ability tests are valid predictors of performance on the job and in training for all jobs, in all settings; cognitive ability tests are equally valid for minority and majority applicants and are fair to minority applicants in that they do not underestimate the expected job performance of minority groups; and the use of cognitive ability tests for selection in hiring can produce large labor cost savings ranging from 18 million per year for small employers such as the Philadelphia Police Department (5,000 employees) to 16 billion per year for large employers such as the federal government (4 million employees).[1/]

Accordingly, it can readily be seen that the court of appeals misused a holding of

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1. Schmidt & Hunter, Employment Testing: Old Theories and New Research Findings, 36 American Psychologist 1128 (1981) (citations and footnotes omitted).

this Court in such a way as to render it practically impossible for a relatively small employer such as Petitioner to use an employment test available to larger employers[2/], but it is also readily apparent that this case is potentially of enormous national significance, given the spectacular efficiencies which could result to both public and private employers were they allowed to use professionally prepared employment tests validated in other settings.

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2. The Wonderlic Personnel Test has been found to be valid in a case affirmed by the Fifth Circuit, Cormier v. PPG Industries, Inc., 519 F. Supp. 211 (W.D. La. 1981), aff'd, 702 F.2d 567 (5th Cir. 1983). While it is noteworthy that the Sixth Circuit would seem to have taken a position different than that of the Fifth Circuit, it is perhaps more significant that an industrial giant such as PPG Industries can enjoy the benefits of the Wonderlic Personnel Test while a small employer, without the resources of PPG Industries, may not.

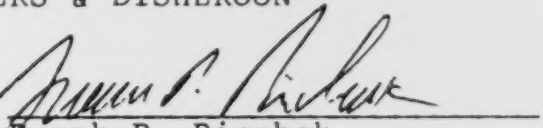
Finally, it is submitted that this Court never intended to codify in the law the science as it existed in the early 1970's. It is possible to rely on the validation studies conducted by others, and the fact that jobs might differ slightly does not alter the evidence, credited by the district court in this case, that the higher the score on the Wonderlic Personnel Test, the better will be the predictable job performance of that applicant.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HUTCHESON, MOSELEY, PINCHAK, POWERS & DISHEROON

By: 

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